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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
94996	MEMO	RHETT DAWSON TO BAKER	1	5/16/1988	B6
94997	MEMO	ARTHUR CULVAHOUSE TO BAKER AND COLIN POWELL RE INF TREATY-PROPOSED SENATE RESOLUTION OF RATIFICATION [ITEM IS STILL UNDER REVIEW UNDER THE PROVISIONS OF EO 13233]			
94995	PAPER	RE POINTS TO BE MADE RE MEETING WITH FORMER SENATOR JOHN TOWER ***R 5/2/2011 M301/1***	2	ND	B1

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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WITHDRAWAL SHEET
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Collection: Baker, Howard H. Jr.: Files
OA/Box: Box 2
File Folder: INF [Intermediate-Range Nuclear Forces] Agreement Materials (1)

Archivist: kdb
FOIA ID: F1997-066/6, D. Cohen
Date: 08/04/2004

DOCUMENT NO. & TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Rhett Dawson to H. Baker, 1p	5/16/88	B6
2. memo	Arthur Culvahouse to H. Baker and Colin Powell re INF Treaty – Proposed Senate resolution of ratification [Item is still under review under the provisions of EO 13233] 2p 5/5/09 EOB	3/24/88	
3. talking points (90208)	for meeting with former Senator Tower, 2p	n.d.	B1

RESTRICTIONS

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B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
B-7a Release could reasonably be expected to interfere with enforcement proceedings [(b)(7)(A) of the FOIA].
B-7b Release would deprive an individual of the right to a fair trial or impartial adjudication [(b)(7)(B) of the FOIA]
B-7c Release could reasonably be expected to cause unwarranted invasion or privacy [(b)(7)(C) of the FOIA].
B-7d Release could reasonably be expected to disclose the identity of a confidential source [(b)(7)(D) of the FOIA].
B-7e Release would disclose techniques or procedures for law enforcement investigations or prosecutions or would disclose guidelines which could reasonably be expected to risk circumvention of the law [(b)(7)(E) of the FOIA].
B-7f Release could reasonably be expected to endanger the life or physical safety of any individual [(b)(7)(F) of the FOIA].
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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THE WHITE HOUSE

WASHINGTON

May 26, 1988

SUBJECT: INF Update

This update provides information as of 0730, Washington time, on May 26.

Procedural Situation

The Senate has agreed by unanimous consent that it will meet today (Thursday, May 26) at 10:00 a.m. in executive session and that, at that time:

-- the pending Committee amendment (Biden/Treaty Interpretation) and the second degree amendment to it (Byrd/Revised Treaty Interpretation) will be temporarily set aside (again)

-- that the Senate will consider the following trio of amendments (which may, or may not, be fused together, as the sponsors choose), with 40 minutes on each amendment:

  -- Nunn-Warner on future weapons

  -- Boren-Cohen on on-site verification

  -- Helms on corrections ("corrigendum")

-- at the conclusion of consideration of the trio of amendments, the Majority Leader will be recognized

-- pursuant to the unanimous consent, the vote on cloture (which otherwise would occur one hour after the Senate convenes today) is postponed.

The requirement that the floor pass to the Majority Leader after consideration of the trio of amendments provides the Majority Leader with the opportunity to ask unanimous consent, or to move, that the cloture vote be further postponed, if circumstances so warrant at that time. If he does not so move at that time, the cloture vote would occur.

The Leadership continues its efforts to pursue unanimous consent agreements that will ensure expeditious consideration of all further amendments.

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The Leadership continues its efforts to pursue unanimous consent agreements that will ensure expeditious consideration of all further amendments.

THE WHITE HOUSE
WASHINGTON

Senator,

The attached memo is from me to you and has not been reviewed by anyone other than John Rock.

Rhett 5/16

THE WHITE HOUSE

WASHINGTON

April 11, 1988

MEMORANDUM TO SENATOR HOWARD BAKER
COLIN POWELL
A. B. CULVAHOUSE
RHETT DAWSON

THROUGH: ALAN M. KRANOWITZ ~~EBA~~ for AMK

FROM: PAMELA J. TURNER

SUBJECT: INF Report Language

Attached is an "unofficial" copy of majority staff draft language on the treaty interpretation portion of the Senate Foreign Relations Committee's Report on INF. They have requested comments from Committee members by noon Wednesday, with a tentative filing deadline of Friday.

Attachment

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THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER 1 LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

IX. TREATY INTERPRETATION
(CONDITION ADOPTED BY THE COMMITTEE)

While intent on opposing any unnecessary encumbrance on the resolution of ratification, the Committee felt compelled to address the issue of treaty interpretation. The Committee did so by approving a formal Condition which affirms certain constitutional principles relating to the Treaty Power, and requires that these principles govern U.S. interpretation of the INF Treaty.

Some Senators questioned the Committee's need to act on the treaty interpretation issue, particularly in the context of a treaty that will mandate a relatively prompt 3-year dismantlement of intermediate-range missiles. Is interpretation of the INF Treaty really an issue? The Committee's answer is affirmative, for three reasons:

-- First, the issue is indeed relevant to the INF Treaty. While involving a 3-year missile elimination phase, the INF Treaty is designed to ban a defined class of missiles permanently. Thus, the Treaty's limitations and prohibitions will entail the complexities of interpretation and implementation over a period of unlimited duration.

-- Second, the issue can hardly be avoided. The Committee could not sidestep the fundamental constitutional question raised by the Administration's recent promulgation of an extraordinary doctrine which asserts wide presidential latitude in the interpretation of a treaty, notwithstanding what the Senate may have been told in consenting to ratification. To ignore this question, while dealing with a major treaty, could imply acquiesence in the doctrine.

-- Third, the inclusion of a Condition on treaty interpretation represented the least problematic means of handling a potentially grave problem for the INF Treaty. In the absence of a Condition reaffirming traditional principles of treaty interpretation -- under which the Senate can accept Executive explanations as having binding significance -- the Senate would face the alternative of considering countless other Conditions designed to formalize the Senate's understanding of various INF Treaty provisions.

A. The Treaty Power

The Framers of the Constitution vested in Congress four specific means of shaping American foreign policy: (1) a crucial role in exercise of the War Power, deriving from the power to raise armies and navies and to declare war; (2) the power of the purse; (3) an advice and consent role in key presidential

appointments, including ambassadors; and (4) an advice and consent role -- requiring a 2/3 Senate majority -- in the making of treaties. Because treaties constitute solemn international commitments of the United States, and hold domestic status as "supreme Law of the Land," the Senate's shared role in the Treaty Power is a central constitutional provision.

The essence of the Treaty Power is that the President and Senate are partners in the process by which the United States enters into international obligations. The Constitution's Treaty Clause (Article II, section 2, clause 2) states that the President "shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators...concur."

In the words of Alexander Hamilton, the Framers of the Constitution considered the division of the Treaty Power between the Executive and the Senate to be "one of the best digested and most unexceptional parts of the plan." It would have been "utterly unsafe and improper," Hamilton wrote, to entrust the power of making treaties in the President alone. Hamilton's most famous dictum applied directly to the Treaty Power:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.

It is fundamental to the logic of the Treaty Clause that it does not envisage that the President may unilaterally re-make a treaty. If he could, the Senate's portion of the shared power inherent in the Treaty Clause would be nullified.

B. Origins of the Issue

Last year, in seeking to justify the Administration's "broad" interpretation of the 1972 ABM Treaty, the State Department Legal Adviser, Judge Sofaer, advanced two claims -- one factual, the other constitutional:

> (1) The factual claim is that the entire ABM Treaty, in design, genesis, and implementation, was fraught with ambiguity: ambiguity in what the negotiators agreed to, ambiguity in the text they produced, ambiguity in the Executive presentation to the Senate, ambiguity in the Senate's understanding of the Treaty, and ambiguity in the subsequent practice of the parties.

(2) The constitutional claim is that what the Senate is told in the process of consenting to a treaty is not in itself of binding significance in determining the President's obligation in carrying out the treaty.

The constitutional claim was manifest in a number of statements made by Judge Sofaer, but none more crystallized the issue for Senators than this assertion, made during joint Foreign Relations-Judiciary Committee hearings in early 1987: "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] was provided." Questioning how a treaty could be "made" prior to the Senate's consent, Senators grew increasingly concerned about the Administration's concept of the Treaty Power.

In 1987, the Foreign Relations Committee devoted considerable time and attention to the ABM Treaty dispute in both of these dimensions: factual and constitutional.[1] Having done so, the Committee found no reason, while considering the INF Treaty, to debate again the overall validity of the Administration's assertion of a "broad" interpretation of the ABM Treaty as opposed to the traditional "narrow" interpretation. Indeed, in the Committee's view, that issue is being adequately addressed elsewhere:

-- First, as to U.S. policy in pursuing the development and testing of ABM systems, that issue is now being addressed through the normal give-and-take of the U.S. strategic policy debate. By means of an amendment to the FY88-89 DoD authorization, Congress has employed the power of the purse to assert its view, and similar amendments in the future will succeed or fail on the basis of policy debate.

-- Second, and even more to the point, it has become patently clear that the future of the ABM Treaty will be decided not by further debate over the meaning of the 1972 provisions but by superpower negotiation over how that Treaty will be refined or superceded by agreed limits on precisely what kinds of development, testing, and deployments of strategic defenses are to be permitted in light of current technology. Such negotiation is virtually

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[1] For the Foreign Relations Committee's actions and views with regard to the overall ABM Treaty dispute, see the Committee's March-April 1987 joint hearings with the Judiciary Committee, entitled "The ABM Treaty and the Constitution," and the Committee's September 1987 report on S. Res. 167, "The ABM Treaty Interpretation Resolution."

inevitable -- and the need for it is now part of the Reagan Administration's own position -- because the United States and the Soviet Union, as a precondition of agreeing on major reductions in strategic offensive arms, will be required by self interest to achieve a clear and detailed understanding of which kinds of ABM systems are to be anticipated in the future strategic environment. Such certainty can only be attained by superpower agreement concerning the fate of the ABM Treaty.

In sum, the future of U.S. policy with regard to ABM systems, and U.S. participation in the ABM Treaty, will be addressed in the budget process and in negotiations with the Soviet Union. The Committee was unanimous in believing that its action on the INF Treaty required no resolution of the "broad-versus-narrow" ABM Treaty debate.

The one legacy of that debate which the Committee could not overlook, however, was the Administration's constitutional assertion of a clearly delineated and unprecedented doctrine under which the President has wide latitude for treaty "reinterpretations," notwithstanding what the Senate may have been told in the course of granting consent to ratification. The Committee was intent upon addressing and refuting this effort at Executive enlargement of its share of the Treaty Power.

Thus, those who have described the Committee's interest in the treaty interpretation issue as an effort to refight the old ABM battle have completely missed the point. The Committee is looking forward -- to the successful implementation of the INF Treaty and other treaties -- and looking backward only to a crucial constitutional provision established 200 years ago, which the Committee feels duty-bound to uphold and affirm.

C. Description of the Sofaer Doctrine

In defending its new, "broad" interpretation of the ABM Treaty, the Reagan Administration employed a dual-track approach:

(1) In the context of international law, it used a new reading of the ABM Treaty text and of internal U.S. Government memoranda from 1971-72 (the "negotiating record"[2]) as a basis for asserting that the two

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[2]Under international law (and also under domestic law), the primary source of interpretation is the text, which should be interpreted in accordance with the ordinary meaning to be

superpowers had not actually agreed to limit the development of ABM systems based on new technologies.

(2) In the context of domestic, constitutional law, it argued that the ambiguities in the Treaty text and in the negotiating history had been reflected in the Executive's presentation to the Senate -- and buttressed this claim with a newly-minted doctrine which asserted wide Executive latitude for "reinterpretation" of treaties.

Within the context of constitutional law, the argument of pervasive ambiguity -- in the ABM Treaty's design and its presentation to the Senate -- would have been sufficient, in terms of logic, to assert Executive latitude for a "broad" interpretation of the Treaty. Such an approach would have emphasized that the ABM Treaty was being interpreted "within the bounds of original ambiguity," rather than "reinterpreted."[3]

The additional assertion, however, amounted to a new constitutional doctrine -- which the Committee shall call the

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given the treaty's terms in light of their context and in light of the treaty's object and purpose. Another major source of interpretation under international law is practice under the treaty. But the negotiating history -- which refers to what happened, as opposed to any particular set of documents -- is also recognized as having some interpretive significance insofar as it may reflect what the parties commonly understood about the meaning of the text.

For a discussion of the complexities of defining what a "negotiating record" might be, see the Committee's September 1987 report on S. Res. 167, pp. 49-51. See also Restatement of the Law, Foreign Relations Law of the United States (Revised), The American Law Institute, 1986; and Reports of the International Law Commission, United Nations, 1966.

[3]Because of its interest in avoiding a renewed debate over the "broad-versus-narrow" interpretation of the ABM Treaty, the Committee will not comment here on its evaluation of the persuasiveness of the factual case for the "broad" interpretation; i.e., that the ABM Treaty was -- in genesis, design, and presentation to the Senate -- suffused with ambiguity. The Committee notes only that the assertion of such pervasive ambiguity in the original "shared understanding" of the Treaty, held by the Executive and the Senate, is logically sufficient to make the case for a "broad" interpretation without any need for innovative constitutional assertions.

Sofaer Doctrine -- that effectively asserts an Executive right of "reinterpretation."

The essence of this doctrine is the assertion that the Executive is not bound, in implementing a treaty, by what it has told the Senate in seeking consent to ratification. The Executive is only bound, according to the Sofaer Doctrine, by a particular interpretation of a treaty's meaning if that interpretation meets three criteria: the particular interpretation must have been (1) "generally understood" by the Senate, (2) "clearly intended" by the Senate, and (3) "relied upon" by the Senate.

These concepts appear straight-forward and appealing. But in practice they are susceptible to such elasticity as to constitute extremely difficult-to-meet criteria for what in a treaty may not be "reinterpreted":

-- (1) How many Senators must speak on a given interpretation before can be proven that the Senate "generally understood" that interpretation?

-- (2) How, unless the Senate has affirmed a particular interpretation by means of a formal condition, can it be demonstrated that the Senate "clearly intended" a particular interpretation?

-- (3) And if "relied upon" means (as Administration officials have suggested) that a particular interpretation was crucial to the Senate's action in approving a treaty, or refraining from the imposition of a formal condition, how can that negative proposition -- "The Senate wouldn't have done x if it weren't for y" -- ever be proven?

Yet, under the Sofaer Doctrine, all three of these difficult proofs are required if a particular treaty interpretation is not to be subject to "reinterpretation."

Thus, the Sofaer Doctrine is in effect an assertion of wide Executive latitude in treaty interpretation by means of the assertion, in the context of domestic law, of difficult-to-meet criteria for what may not be reintrepreted. If a particular interpretation of a particular provision of a treaty does not meet these criteria, it is subject -- according to the Sofaer Doctrine -- to any interpretation the President may wish to place upon it.

As subsequent discussion will underscore, the import of this assertion is that the Senate is not a partner in the treaty process, but essentially an adversary -- an on-looker of secondary status which, while it may derive some momentary power from its ability to block a treaty or impose formal conditions

on its consent, must take extraordinary precautions if what it is told by the Executive about a treaty is to be determinative of the Executive's obligations in interpreting and implementing that treaty.

It bears note that there is no necessary relationship between the Sofaer Doctrine and a treaty's "negotiating record." By way of example, one may imagine circumstances in which the Sofaer Doctrine would be asserted but the "negotiating record" would play no role. Let us say that President Reagan's successor and Secretary Gorbachev wished to "reinterpret" the INF Treaty in a manner inconsistent with what the Senate had been told in consenting to ratification. The Sofaer Doctrine would play the role of helping the Administration loosen its obligations under domestic law, while as between the parties there would be no resistance to the new meaning being put on existing words and thus no need to justify the change by reference to a "record." Indeed, under this scenario the "record" would be assiduously disregarded, because it reflected a meaning contrary to that which the parties wished to adopt.

Against this background one can examine Judge Sofaer's provocative declaration that "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] was provided."

With the Senate's role denigrated by the Sofaer Doctrine to that of temporary obstacle to a treaty, rather than co-maker, the essence of a treaty from the U.S. perspective becomes not what the Executive and the Senate jointly understood at the outset but what the Executive at any moment wants to assert was agreed to with the other party. What is being asserted is that domestic law imposes little constraint on the Executive's freedom of action, and that what constraint there is would be embodied in an Executive determination that the Senate has fulfilled the Sofaer Doctrine criteria with regard to any particular interpretation. International law, and whatever the President can assert within that context, thus acquires -- under the Sofaer model -- a <u>de facto</u> supremacy.

There is, of course, a central defect in Judge Sofaer's supposition that the President unilaterally "makes" treaties which the Senate subsequently is asked to approve. Constitutionally, no treaty is "made" until the Senate has given its consent. This is how a treaty becomes part of "the supreme Law of the Land."

The Legal Adviser's statement implies that the meaning of a U.S.-Soviet treaty is to be gleaned not by examination of what the President and the <u>Senate</u> jointly understood, but by examination of what the President and the <u>Soviets</u> agreed upon -- regardless of what the President may or may not have told the

Senate. This is tantamount to saying that a U.S.-Soviet treaty becomes the supreme law of the United States with the advice and consent of the Soviet Union. The Constitution provides otherwise.

D. Basic Argument Against the Sofaer Doctrine

The basic argument against the Sofaer Doctrine is that it is founded on the faulty premise that the Senate is not an integral part of establishing the meaning of a treaty under U.S. constitutional law -- except insofar as the Senate does so through affirmative steps which impose restrictions on Executive latitude. The Doctrine entirely undercuts the most basic model of treaty-creation: that the Executive negotiates, explains its proposed treaty to a listening Senate, and then on that basis is accorded consent to ratify the treaty that has been explained.

Under the Constitution, the President may only ratify a treaty to which the Senate advised and consented. And it must be taken as axiomatic that the Senate cannot consent to that which it did not understand. Accordingly, the operative principle of treaty-making under the Constitution must be that, as co-makers of a treaty for the United States, the Executive and the Senate share a common understanding of a treaty which has binding significance domestically as the treaty, upon ratification, becomes an integral part of United States law.

In the establishment and determination of that common understanding, the concept of legislative intent must be as applicable to treaties as it is to statutory law, in which intent may be explicit or implicit.

Explicit understandings regarding a treaty's meaning are manifest in formal conditions to the Senate's consent. These conditions include amendments to the text of a treaty as well as amendments to the resolution of ratification, such as "reservations," "understandings," and the like.

Implicit understandings represent Senate agreement with and acceptance of the Executive's explanations of the treaty. Whereas explicit understandings may at times entail the Senate's imposition on the Executive of a meaning not originally intended by the Executive, implicit understandings never do; they can only reaffirm the meaning presented by the Executive.

Although not formalized, implicit understandings must necessarily be equal in significance to explicit understandings. To accord them lesser significance would be illogical because implicit understandings commonly occur precisely where there is no disagreement as to meaning and where no issue has arisen. Such understandings are reflected in the various materials traditionally described as legislative

history. These sources include hearings and committee reports, as well as debates transcribed into the Congressional Record. Such sources must be regarded as indicia of legislative intent as much for a treaty as for a statute.

What is crucial is that legislative intent, with regard to a treaty as well as a statute, is expressed not only in language drafted by legislators but in unchallenged communications of the Executive. Under longstanding principles of textual construction, Executive communications to the Congress concerning the meaning of a text are evidence of the meaning of that text if Congress (or the Senate) acquiesces in that meaning. In other words, the legislative branch is deemed to be placed on notice by the Executive that certain words will be construed in a certain manner. If Congress wishes a different meaning to obtain, it may act so as to effect that different meaning. If Congress does not act, however, it is properly deemed to have accepted -- and to intend -- the meaning communciated by the Executive.

In testimony to a joint hearing of the Judiciary and Foreign Relations Committees, Professor Louis Henkin, chief reporter of the Restatement of U.S. Foreign Relations Law[4], summarized this concept as follows: "Where several [Executive] statements are made and there is general acceptance of their tenor, that is the Senate understanding. That is true in the case of Senate consent to a treaty, as it would be in the legislative history of a statute."

Clearly, in determining whether the Senate consented to the ratification of a treaty pursuant to an implicit understanding, a rule of reason must apply. Obviously, where the indicia of Senate intent or understanding (including unchallenged Executive communications or explanations) are few or inconsistent, no implicit Senate intent can reasonably be said to exist. On the other hand, where the indicia of intent (again, including unchallenged Executive communications or explanations) are several and largely consistent, an implicit intent can reasonably be concluded to exist. In such circumstances, the President is bound constitutionally to regard that intent as an implicit Senate understanding, and therefore an implicit condition of the Senate's consent. The Chief Executive cannot bring the treaty into force unless it reflects that condition, and subsequent Presidents must interpret the treaty subject to that intent.

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[4]The full title of this preeminent compendium of U.S. law in the realm of foreign affairs is Restatement of the Law, Foreign Relations Law of the United States (Revised), 1986.

The essence of the Sofaer Doctrine is to reject this concept of legislative intent as it has been normally understood, and to replace it with a requirement that the Senate act affirmatively to formally demonstrate what is "generally understood, clearly intended, and relied upon" regarding every provision of a treaty, lest that provision be subject to any interpretation a President may later prefer.

E. Implications of the Sofaer Doctrine

In very practical terms, the Sofaer Doctrine, if accepted, threatens two far-reaching and dangerous consequences:

(1) Nullification of the Senate's Treaty Power. A presidential right to adopt a different interpretation of a treaty, irrespective of the understanding on which the Senate based its consent, would tend to nullify the Senate's share of the Treaty Power and thus undermine a basic provision of the Constitution.

(2) Paralysis in Treaty-Making. The Senate's only recourse, to prevent its share of the Treaty Power being nullified, would be to attach elaborate and numerous reservations to treaties in order to have the Senate's understanding become an integral part of the ratification documents. Such procedure could easily overburden the treaty process to the point of paralysis.

F. The INF Treaty and the Sofaer Doctrine

In the context of the Senate's consideration of the INF Treaty, two letters -- from Secretary of State Shultz and from White House Counsel Culvahouse (both reprinted in the Appendix) -- became the focus of Senate efforts to deal with the Administration's constitutional assertions.

Some Senators originally saw in the Shultz letter (dated February 9, 1988) an indication of Administration willingness to retreat from its assertion of the Sofaer Doctrine, and thus reacted with disappointment when the doctrine was clearly reasserted in the letter (dated March 17, 1988) signed by White House Counsel Culvahouse. Under analysis, however, it becomes clear that the Administration has remained consistent in its adherence to the Sofaer Doctrine.

Accordingly, the Committee agrees with Mr. Culvahouse (as he stated in a brief follow-up letter dated March 22, 1988) that the Shultz and Culvahouse letters are consistent on the question of treaty interpretation. The Shultz letter tiptoed around the Sofaer Doctrine; Mr. Culvahouse simply stated the

Administration's views on the Sofaer Doctrine clearly and boldly.

The key to understanding this consistency is to recognize that the Administration conceded virtually nothing in the Shultz letter, which contained only these three items:

(1) an assertion that Administration testimony on the INF Treaty is "authoritative" (which appears to mean nothing more than dependably accurate);

(2) a kind of admonition that, because of these dependably accurate statements, the Senate need not incorporate Executive materials and testimony in the resolution of ratification -- but no clear statement that this or a future Administration would be bound in any legal sense by such an "authoritative" presentation;

(3) a promise that the Reagan Administration would not depart from the meaning of the INF Treaty as presented to the Senate.

These three elements offer absolutely nothing by way of any agreement on principles as to what would bind the Executive. Distilled, they say no more than "Trust Us":

(1) "You can count on what we say";

(2) "Please don't bother embroidering your resolution of ratification";

(3) "We promise not to 'reinterpret' the INF Treaty so long as President Reagan remains in office."

Most revealing is statement (3), which implicitly says, "We are not commenting here about what right either we or a future Administration might actually have in 'reinterpreting' this treaty. We simply promise not to 'reinterpret' for the next few months."

It was only because excessive claims were made about the Shultz letter in the first place -- i.e., some chose to see statement (2) as implying that the Executive would be bound by "authoritative" statements -- that the Culvahouse letter seemed to some to be a step backward. In fact, Mr. Culvahouse simply articulated the premises underlying the apparently forthcoming, but essentially noncommittal language in the Shultz letter.

The essence of the Culvahouse letter is its clear reiteration of the Sofaer Doctrine, which asserts wide Executive latitude for "reinterpretations" by promulgating difficult-to-meet criteria for what provisions in a treaty may not be "reinterpreted":

> As a matter of domestic law...the President is bound by shared interpretations which were both authoritatively communicated to the Senate by the Executive and clearly intended, generally understood and relied upon by the

> Senate in its advice and consent to ratification. [Emphasis added.]

In criticizing the draft Biden Condition under consideration by the Committee, the Culvahouse letter agreed that U.S. treaty interpretation must be based on the "shared understanding" of the Executive and the Senate when a treaty is made. But it rejected any notion that such "shared understandings" of binding significance could be found simply be examining the record of Executive testimony:

> [The Biden Condition] apparently would define that shared understanding as encompassing all statements made by officials of the Executive branch during ratification proceedings. These statements presumably include and attribute equal dignity to the Secretary of State's definitive article-by-article analysis and to the extensive testimony of Cabinet members, treaty negotiators and other Executive branch officials, as well as to the Administration's answers to over 1000 questions submitted by Members of the Senate, no matter how trivial or unimportant the issue may be to the Senate's advice and consent deliberation.

In testifying to the Foreign Relations Committee, Senator Nunn saw this sentence as casting doubt on the "authoritativeness" of all Executive branch communications concerning the INF Treaty. But in fact the Culvahouse letter does not deny that all Executive branch communications are "authoritative." Rather, it denies that all "authoritative" communications meet the criteria of the Sofaer Doctrine as to what is binding on the Executive.

This confusion apparently rests on Senator Nunn's reasonable premise that "authoritative" testimony should have binding significance. But this is a premise that the Administration has never acknowledged -- in the Shultz letter or anywhere else.

G. Purpose and Content of the Biden Condition

The purpose of the condition drafted by Senator Biden -- and offered on his behalf by Senator Cranston -- is to reaffirm the long-standing practice and long-standing principle that the "shared understanding" of the Executive and the Senate, as reflected in the Executive's formal representations, is indeed fully binding -- as opposed to binding only with regard to those provisions and interpretations which the Senate has gone to extraordinary lengths to brand as crucial to its consent, by formal condition or some other means.

Unlike the Sofaer Doctrine, the Biden Condition envisages the Executive and the Senate not as adversaries in the

treaty-making process but as partners -- co-makers of the treaty on behalf of the United States.

While both the Biden Condition and the Sofaer Doctrine rest upon the premise that a "shared understanding" is required to bind the Executive to a given interpretation of a treaty, the crucial difference is that the Biden Condition envisages that a "shared understanding" will be reflected in all "authoritative" statements by the Executive. Under the Sofaer Doctrine, the Executive is bound only by those "shared understandings" which the Senate has somehow labeled crucial to its consent by fulfilling the criteria of "generally understood, clearly intended, and relied upon".

The Committee's purpose, in adopting the Condition, was to lead the Senate to affirm a set of principles which reflect long-standing constitutional practice. By so doing, the Senate can:

-- avoid the need for other conditions pertaining to specific interpretations of the INF Treaty;
-- repudiate a pernicious doctrine that was asserted solely for a specific purpose;
-- establish a position with regard to future treaties such that the Senate can avoid repeating the inclusion of a formal condition. The Senate's 1988 action will have been sufficient to reaffirm fundamental constitutional principles of treaty-making.

The Biden Condition was drafted in consultation with Professor Louis Henkin, chief reporter of the Restatement of U.S. Foreign Relations Law and the nation's most generally esteemed scholar in this field. The provision was designed to articulate and affirm, as succinctly as possible, these constitutional principles reflected in time-honored practice: to wit, that the original shared understanding of the Executive and the Senate must govern a treaty's subsequent implementation, and that such understanding is reflected in the Executive's presentation to the Senate.

A key consideration in the drafting of the Condition was to strike an appropriate balance between the general and the specific. As stated earlier, the Committee did not wish to see the Senate fight once again a battle over the Administration's "broad" interpretation of the ABM Treaty. The Committee therefore sought to direct this Condition, to the maximum degree possible, to the INF Treaty. At the same time, however, the Commitee's purpose, in addressing the treaty interpretation issue, was not to erect sui generis barriers against any "reinterpretation" of the INF Treaty, but to affirm principles that inherently apply to the INF Treaty.

The Committee notes that, in one respect, its action in including this Condition in the INF Treaty's resolution of ratification was unnecessary insofar as principles which inherently apply to the INF Treaty would apply even in the absence of any Senate action affirming them. Given the circumstances, however, the Committee judged that to fail to affirm such principles could suggest some degree of acquiesence in the Sofaer Doctrine, which the Committee views as an Executive attempt to assert an unconstitutional arrogation of the Treaty Power. In this sense the Committee views the Biden Condition, paradoxically, as both unnecessary and highly significant.

The Condition, as approved by the Foreign Relations Committee, stipulates as follows:

> That this Treaty shall be subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (Article II, section 2, clause 2) for the making of treaties:
>
> (a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification;
>
> (b) such common understanding is:
>
> (i) based on the text of the Treaty; and
>
> (ii) reflected in the authoritative representations provided by the Executive branch to the Senate and its committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;
>
> (c) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute.

The Condition also stipulates that "This understanding shall not be incorporated in the instruments of ratification of this Treaty or otherwise officially conveyed to the other contracting Party."

Several concepts in the Condition warrant discussion:

Text of the Treaty: Both domestic and international law give primacy in treaty interpretation to the text of the treaty. International law requires that a treaty be interpreted in accordance with the ordinary meaning to be given the treaty's terms in light of their context and in light of the treaty's object and purpose. Domestic law does not differ, and is also premised on the assumption that the Executive and the Senate, as

co-makers of a treaty for the United States, will share a common understanding of a treaty's text. As a matter of record, that common understanding of the text will be reflected in the Executive's formal presentation of the treaty to the Senate: in formal presentation documents, in prepared testimony, and in verbal and written intercourse regarding the treaty's meaning and effect.

In Professor Henkin's judgment, the phrase "meaning of a treaty" in the original draft Condition included the treaty text. However, in order to underscore that the Biden Condition had not (as alleged in the Culvahouse letter) ignored the primacy of the treaty text as a source of interpretation, the draft Condition was altered at the initiative of Senator Dodd, who worked in consultation with Professor Henkin to refine language that would serve to preempt any further criticism along such lines. Senator Dodd's adjustments in the Condition also served to underscore that the Executive's "authoritative" representations have interpretive significance only insofar as such representations relate to the meaning and legal effect of the treaty text. Thus are excluded the Administration's answers to such questions as "What is the overall effect of the INF Treaty on U.S. security?" and "What will the Administration do to ensure an adequate military balance in Europe?"

Authoritative Representations: With regard to what constitutes an "authoritative" representation by the Executive, a rule of reason must apply. Certainly, substantial weight must be accorded the Executive's formal presentation documents, which include the treaty itself and a detailed explanation of the Executive's understanding of the treaty's terms. Considerable weight must also be accorded the prepared testimony of top Executive officials. Additional information elicited during Executive-Senate interaction regarding the meaning and legal effect of treaty terms will also be important because such discussion and questioning will cover items of particular interest and concern to the Senate, as a co-maker of the treaty for the United States. The overall significance of Executive branch representations makes it incumbent upon the Executive to take great care to avoid or remove any inconsistency in its overall presentation of a treaty. The possibility, however, that the Executive may prove fallible -- that an "authoritative" representation could, on rare occasion, be inconsistent with the text of the treaty, or with another "authoritative" representation -- is simply an unavoidable fact of life, which does not in any way diminish the crucial role of such representations in providing evidence of the common understanding of the text of a treaty held originally by the Executive and the Senate as co-makers of a treaty.

In this context arises the question of the role of the INF Treaty "negotiating record," access to which was afforded

Senators not as a part of the Executive's formal or "authoritative" presentation of the Treaty, but in response to a Senate request. This is discussed in the following section, entitled "The INF Treaty Negotiating Record."

Methods for Establishing New Interpretations: As originally drafted, the Biden Condition stated that the United States would not agree to or adopt a new interpretation of the INF Treaty without the "approval of the Senate." That phrase was intended to encompass three possibilities, each of which would legitimately result in the United States adopting a different interpretation of a treaty:

(1) an amendment to the treaty, accomplished by protocol or other means and ratified by the Executive with the advice and consent of the Senate;
(2) a change in the treaty's terms of implementation agreed to by the parties under procedures established by the treaty as originally ratified with the advice and consent of the Senate; and
(3) a subsequent statute.

In response to a concern expressed by Senator Helms that this should be stated more explicitly, Senator Cranston offered new phrasing which substituted the words, "except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute." Professor Henkin subsequently indicated his judgment that the principle being enunciated had not been altered by the change in language.

With regard to the modality of a statute resulting in a change in U.S. treaty interpretation, the Committee wishes to emphasize that the Condition envisages this possibility not as a matter of advocacy but as a matter of accuracy. In the overwhelming majority of cases, the preferable course for the United States is for the Executive to negotiate an international agreement -- a new treaty or a protocol to an existing treaty -- which is subsequently ratified with the advice and consent of the Senate. However, as a practical reality, it is a truth of U.S. domestic law that a statute requiring the President to adopt a new interpretation of a treaty is binding on the Executive.[5]

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[5]One example, during the Wilson Administration, involved a congressionally-initiated statute requiring a new U.S. policy that contravened existing international arrangements pertaining to the Panama Canal. In successfully persuading Congress to repeal this legislation, President Wilson argued that the United States is simply "too big and powerful and self-respecting" to put a strained interpretation on its promises.

As a technical point, the Committee notes that nothing in the language of the Condition is inconsistent with the President's inherent power to conclude Executive agreements.

Non-Conveyance of Condition to the Other Party: A stipulation that the Condition not be conveyed to the Soviet Union as a part of the instruments of ratification was included in the Condition at the initiative of Senator Helms. The Committee viewed this as a matter of underscoring that the Condition is not directed to U.S. obligations under international law, which provides the context within which the U.S.-Soviet exchange of instruments of ratification will occur. Rather, the Condition is binding under domestic law, and obtains its binding effect because the President, in the absence of the resolution of ratification, lacks authority to participate in the treaty's ratification. He obtains such authority through the resolution of ratification and is governed by any stipulations by which the Senate conditions its consent.

In sum, the President is not in a position to have the consent without the conditions. Nothing that he or his Administration does, by statement or action, whether before or after the act of ratification, can alter the binding effect of any condition which the Senate places upon its consent to treaty ratification.

H. The INF Treaty "Negotiating Record"

Because the Sofaer Doctrine and the "negotiating record" were closely tied in the ABM dispute, some Senators demanded the "record" of the INF Treaty by means of underscoring the point that the Administration's assertions about the role of the Senate in treaty-making had destroyed any basis on which the Senate could operate in confidence of Executive good faith. Unfortunately, in the Committee's view, the INF Treaty "negotiating record" was provided. Consequently, both the Administration and the Senate now face the task of ensuring that Senate review of "negotiating records" does not become an institutionalized procedure.

The complexities of dealing with the INF Treaty's "negotiating record" demonstrate why regularizing a practice of obtaining treaty "negotiating records" could be detrimental to the treaty-making process. The Senate now has an implied, self-imposed task of considerable scope in digesting this material and satisfying itself that the "record" is consistent

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with the text of the INF Treaty and the representations of the Executive branch. Moreover, a systemic expectation of Senate perusal of every key treaty's "negotiating record" could be expected to inhibit candor during future negotiations and induce posturing on the part of U.S. negotiators and their counterparts during sensitive discussions. The overall effect -- of fully exposed negotiations followed by a far more complicated Senate review -- would be to weaken the treaty-making process and thereby to damage American diplomacy.

Now that the INF Treaty "negotiating record" has been made available to the Senate, the status of these documents requires resolution. In the Committee's view, that resolution would not have been satisfactorily achieved by any stipulation in the resolution of ratification declaring that the Senate had scrutinized the "record" and satisfied itself that the "record" was in harmony with the formal Executive branch presentation of the Treaty. Such an approach would entail at least two significant problems:

(a) it would imply that such scrutiny is important to the Senate's examination of treaties and thus should be institutionalized;

(b) it would leave open the question of what is to be done if, in the future, there is an assertion -- for example, by a subsequent Administration -- that notwithstanding the Senate's perception of harmony there was an inconsistency between the "record" and the Executive presentation.

Accordingly, the Committee believes that no formal finding concerning the contents of the INF Treaty "negotiating record" would be wise. In the Committee's judgment, the status of this "record" is established by the basic principles affirmed in the Biden Condition. If U.S. treaty interpretation is to be based upon the shared understanding of the Senate and the Executive at the time of ratification, and if that common understanding is reflected in authoritative statements made in seeking Senate consent to ratification, then sources of interpretation which appear at variance must be subordinated to those authoritative statements.

In sum, although internal Executive memoranda and other negotiating materials may have been available to members of the Senate, some of whom have sought to assure themselves that this "record" is consistent with the Administration's formal presentation, the clear corollary of the constitutional principles cited in the Biden Condition is that such documents need not be examined for consistency and shall not be deemed material to the interpretation of the INF Treaty insofar as they are not consistent with the authoritative representations as to the meaning of the Treaty provided by the Executive branch in seeking Senate consent to ratification.

I. Administration Criticisms of the Biden Condition

The Culvahouse Letter (previously cited and reprinted in the Appendix) makes three charges against the Condition, which the Committee has considered but to which the Committee can attach little weight:

(1) "Changing the Rules of Treaty Interpretation"

Under this heading, the Administration's position makes two false charges and affirms a false principle.

The false charges are that the Condition (a) ignores the text of the treaty as the primary source of meaning; and (b) accords "equal dignity" to all sources of interpretation, ranging from the Secretary of State's definitive article-by-article analysis to the written answers to hundreds of Senators' questions.

As to the importance of the text, there is no issue. No one disputes that the text of a treaty constitutes the crucial source of the treaty's meaning. (As described previously, at the initiative of Senator Dodd the original draft text of the Condition was revised before Committee approval to underscore this point.) The Condition simply affirms that the Executive must continue to interpret a treaty in accord with the original understanding of that meaning shared by the Executive and the Senate.

As to the weight to be given to various parts of the Executive presentation, there is also no real issue. The Administration's position itself envisages that "the interpretation of a treaty [will be] authoritatively shared with...the Senate." Obviously a rule of reason must apply. As stated above, the text is the central source of meaning. But that meaning is elaborated upon through various elements of the Executive's presentation. The Condition does not state that the treaty is "defined by" the Executive's presentation. Rather, it affirms that the "common understanding" of the two branches is reflected in -- meaning evidenced by -- authoritative representations by the Executive.

The Administration, however, does not wish to accept this because it wishes to assert broad latitude for subsequent Executive interpretation. It therefore affirms what, under analysis, proves to be a truly radical constitutional principle: that the Executive must adhere to a given interpretation of a treaty only if that interpretation was "clearly intended, generally understood, and relied upon by the Senate."

(2) "Unconstitutional Mechanism for Altering Treaty Interpretation"

Under this heading, the Administration alleges that the Condition "interferes with the President's constitutional responsibility to interpret and implement treaties and also constitutes an unprecedented arrogation of treaty power by the Senate." This charge is without foundation.

It is indisputably true that the President alone bears the constitutional obligation to interpret and implement treaties, and the principles affirmed by the Condition are perfectly consistent with that. What the President does not have the authority to do is interpret treaties in any way he sees fit. He must do so, if he is to behave constitutionally, in accordance with the original understanding of the treaty. If he wishes to change the meaning of a treaty, he must obtain the agreement of the other party and formalize the change with the established mechanism of Senate advice and consent.

Meanwhile, the President will possess inherent latitude in his capacity as interpreter of every treaty to which the U.S. is a party. In the international context, each such treaty will inevitably provide a measure of flexibility in interpretation and implementation. And in the domestic context, the President will be constrained only by the meaning of each treaty as it was presented to the Senate, which will inevitably leave a myriad of future questions subject to presidential discretion.

(3) "Risk of Unilateral Restrictions on the United States"

Under this heading, the White House letter seeks to raise the specter of the United States being bound by constitutional processes to one interpretation of a treaty while the Soviet Union is free to apply a less restrictive interpretation.

This specter -- originally raised by Judge Sofaer in trying to justify the "broad" ABM Treaty interpretation -- is highly theoretical. It is a truism that the Executive has different obligations under domestic and international law, and therefore it is possible to hypothesize case-book situations in which those obligations could conflict. However, in practice this has not proven to be a serious problem and there is no basis for the Administration's unfounded assertion that the Condition "would substantially increase this risk." The Condition, after all, does no more than state principles which already suffuse the Restatement of U.S. foreign relations law.

An apparent premise of the Sofaer Doctrine is that practical difficulties would ensue if the Executive were bound by what it tells the Senate because it would not be an abnormal circumstance for there to be a difference between what was agreed to with the other party and the explanations provided to the Senate. There should be no such difference. It is the

Executive's responsibility to ensure sufficient clarity in a treaty and in its explanations thereof to the Senate so that no conflict exists between the shared understanding of the parties on the one hand and the shared understanding of the Executive and Senate on the other. If, in extremis, such conflict should arise and prove not resolvable by discussion or negotiation with the other party, the Executive has the option of withdrawing from the treaty.

In sum, this largely theoretical problem should be addressed if and when it arises -- not by a preemptive alteration of constitutional principles. The Senate should not accept a doctrine that assumes and protects carelessness or deviousness on the part of the Executive.

J. Proposed "Compromises" and Other Alternatives

The Committee takes note of assertions by some Senators that the Committee acted in a partisan manner and failed to pursue potential "compromises" that might allegedly have resulted in Committee unanimity on the issue of treaty interpretation. The Committee rejects both assertions as unfounded.

As to partisanship, the Committee finds this charge unfathomable given the support which the Condition enjoyed from two Republican Members, including the Committee's ranking Minority Member, who indicated his willingness to defend the Condition on the Senate floor. Moreover, the Committee notes that when Senator Biden first drafted the Condition he circulated his text to key Republican Senators in hope of engendering bipartisanship on an issue which should be of concern to all Senators.

As to potential "compromises," the Committee takes note of the following text, submitted by supporters of the Administration as a proposed substitute for the Biden Condition:

> (a) that, as a matter of international law, only the mutual obligations assumed by the parties bind the United States;
> (b) that the Senate has relied upon the testimony and written submissions, which it regards as authoritative, of witnesses of the Executive Branch concerning the meaning of the Treaty;
> (c) that, as a matter of domestic law, the United States is bound by interpretations which the Senate clearly intended and generally understood would bind the United States in giving its advice and consent;
> (d) that, the United States, being so bound, no interpretation different from that intended and understood by the Senate, as a matter of domestic law, may be agreed

to or adopted by the United States without appropriate legislative action.

The Committee notes that, while somewhat masked, the Sofaer Doctrine is clearly present in paragraphs (b) and (c), which have the effect of asserting that the three Sofaer Doctrine criteria -- "generally understood, clearly intended, and relied upon" -- must somehow be met lest the Executive have a right of "reinterpretation." In the final analysis, the Committee could hardly be expected to affirm the Sofaer Doctrine in a provision the purpose of which was to refute that doctrine.

To be sure, various members of the Committee and of the Senate leadership displayed a good-faith willingness to discuss possible compromise language. But no compromise was ever reached. Nor was one possible so long as discussions focused on proposals designed to affirm the Sofaer Doctrine and thereby denigrate the Senate's role in exercise of the Treaty Power.

The basic issue remains. On the one hand are those who view the Executive as constrained in treaty interpretation by the original shared understanding of a treaty as reflected in authoritative explanations of the text provided by the Executive in seeking consent to ratification. On the other are those who wish to affirm a radical new doctrine that has the effect of requiring the Senate to meet certain criteria lest the Executive have latitude to "reinterpret" a treaty provision as he may find convenient.

The Committee wishes to emphasize that in asserting the binding significance of the Executive's original representations, it has articulated the principle with great care. Whereas some formulations would have asserted that the Executive is directly and explicitly "bound by" its representations, the Biden Condition makes no such assertion. Rather, beginning with the premise of Executive-Senate partnership in the making of treaties, it asserts only the binding quality of the original "shared understanding" and then asserts a derivative principle: that this "shared understanding" of a treaty's text is "reflected in" -- meaning evidenced by -- the Executive's authoritative representations "insofar as such representations are directed to the meaning and legal effect of the text of the Treaty." This construction helps to underscore that a rule of reason must apply in instances where inconsistencies may appear, lest the Executive be "bound by" two inconsistent requirements. Thus, the Biden Condition is unaggressive and carefully balanced in seeking to articulate the constitutional principles it aims to uphold.

Finally, the Committee notes that any "compromise" of this basic formulation would have the effect of diluting and thereby perverting the provision's basic purpose. The Committee does

not wish to be a party to any act of Executive aggrandizement which, however expedient, would have the effect of impairing the treaty-making process or future American diplomacy. Specifically, the Committee wishes to uphold principles and practices of treaty-making under which the Senate is able to accept the Executive's presentation of a treaty in confidence and approve the treaty in good faith solely on the basis of that presentation, without the obligation of creating an elaborate formal record, or formal conditions, to display what it "generally understood, clearly intended, and relied upon" as a defense against future Executive "reinterpreters."

The only practical alternative to the Biden Condition is to do precisely that: to lade the INF Treaty and its resolution of ratification with an enormous burden of formal amendments, stipulations, conditions, and the like, which could require months of debate. For example, in response to questions, the Administration provided "authoritative" representations regarding a number of issues of direct concern to the Committee, including:

the meaning of "weapon-delivery" vehicle in Article II;
the effect of Article XIV on U.S.-NATO weapons cooperation;
the effect of Article VII on testing of sea-launched cruise missiles; and
the meaning of Article II's definition of the range of an INF Missile.

Given the context created by the Sofaer Doctrine, however, the Committee could not -- without the countervailing effect of the Biden Condition -- have been assured that such Administration representations were determinative of the Executive's obligations in carrying out the Treaty. Accordingly, in the absence of the Biden Condition, some Members would have felt obliged[6] to propose specific conditions on these and other issues.

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[6]By way of a detailed example, the text of the INF Treaty does not clearly state that a "weapon-delivery" vehicle encompasses missiles using future technologies to damage or destroy targets. Nor does the Treaty specifically define a "weapon-delivery" vehicle as a missile capable of damaging or destroying a target. The Administration provided the Committee with a specific assurance that the United States defines the term "weapon-delivery" vehicle as a missile capable of destroying or damaging a target and that missiles employing futuristic technologies such as lasers would be covered by the INF Treaty. Since the INF Treaty is a permanent treaty, the question of whether it covers missiles using futuristic

If the Senate is required to consider formal conditions with regard to every such issue, the result would be indefinite delay, a product which might have been contorted beyond any possibility of U.S.-Soviet ratification, and no resolution at all of the current constitutional issue. Against this prospect, it becomes clear that the Biden Condition is a cautious, responsible, and remarkably simple means of addressing a complex and potentially grave problem.

In sum, the two categories of alternatives to the Biden Condition are both undesirable. So-called "compromise" language would be perverse to the degree that it embraced the Sofaer Doctrine. And to delete the Biden Condition would be to lay the resolution of ratification open to a plethora of proposed conditions on the specifics of INF Treaty interpretation.

K. Relationship to ABM Treaty Dispute

The Committee points out that its interest in avoiding a replay of the ABM Treaty dispute was manifest in its efforts to make this provision as INF Treaty-specific as possible, through the use of the words "this Treaty," although as indicated earlier the Committee recognized that any assertion of principles would have broader meaning.

The Committee therefore reiterates that, even if passed by the Senate, this Condition would not be dispositive on the issue of ABM Treaty interpretation because the essential argument used to justify the "broad" interpretation is not an assertion of constitutional principle but a factual claim of pervasive ambiguity. In other words, the Administration's most basic claim is not actually that it is "reinterpreting" that Treaty but that it is interpreting the Treaty within the wide latitude provided by the general ambiguity which, it argues, surrounded the ABM Treaty's meaning at the time of ratification.

Indeed, Judge Sofaer has argued that the essential reason the United States should adopt the "broad" interpretation of the ABM Treaty is that the fact situation is so ambiguous that if the Soviets asserted their right to a "broad" interpretation the United States would be unable to rebut them. According to Judge Sofaer, "The ambiguity of the Treaty language, and of the negotiating record, would effectively have prevented the President from enforcing the narrow interpretation against the

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technologies is a highly relevant concern. Thus, in the absence of the Biden Condition, the Committee might well have attached a condition to the resolution of ratification on this issue.

Soviets had they decided it was in their interests to support the broad interpretation."

In sum, the Biden Condition is not designed to resolve the dispute over alleged ambiguities in the genesis, design, and implementation of the ABM Treaty, or to constitute a final disposition of the issue of ABM Treaty interpretation. Rather, the provision is intended to affirm certain constitutional principles which have been brought into question during the ABM Treaty debate.

At the same time, the Committee wishes to note, on behalf of those who oppose the Administration's "broad" interpretation, that since the issue of treaty interpretation did not arise during Senate consideration of the ABM Treaty, and was not foreseen at that time, the absence of any action pertaining to interpretation of the ABM Treaty at that time cannot be construed as having any bearing on the interpretation of that Treaty.

L. Conclusion: A Summary of Key Points

In conclusion, the Committee wishes to emphasize what the treaty interpretation issue is and what it is not:

-- The issue addressed by the Biden Condition is not a struggle over who interprets treaties. It is solely and indisputably the President's responsibility to interpret and implement treaties for the United States. At issue is the question of what limits are to govern the President's latitude in exercising that solemn power.

-- The issue is not whether and what testimony by the Executive is "authoritative." To answer that question is still to be without an answer as to whether "authoritative" representations are in anyway binding on the Executive. The issue is whether and how such representations have a binding significance under United States law.

-- The issue is not whether to have a "clean" resolution of ratification for the INF Treaty. The issue is how, without burdening the resolution with a plethora of formal conditions, the Senate can ensure that the current "shared understanding" of the Treaty, as reflected in what the Executive has told the Senate, becomes determinative of the Treaty's future implementation.

-- The issue is not the "broad-versus-narrow" interpretation of the ABM Treaty. The issue is the Sofaer Doctrine, which asserts highly elastic, difficult-to-meet criteria which must allegedly be met before the Executive may not "reinterpret" a given treaty provision. To reject the

Sofaer Doctrine is not to resolve the ABM Treaty dispute, but simply to narrow it to the confines of a debate over facts: that is, to a debate over alleged ambiguities surrounding that particular Treaty.

-- The issue is not over Senate prerogatives but over the President's prerogatives and over a basic constitutional power. Are the Executive and the Senate, as co-makers of a treaty for the United States, to determine the treaty's meaning and effect as "supreme Law of the Land"? Or is every treaty to be subject to the prerogative of "reinterpretation" according to the passing preference of a future President?

-- The issue is not whether the Executive is to be bound by every last utterance of its representatives before Congress, but whether the principle of orginal "shared understanding" is to govern a treaty's implementation. Shall it be axiomatic that such "shared understanding" is reflected in authoritative Executive representations of the treaty's meaning? Or must the Senate deal with the Executive as an adversary, who will not act in good faith and around whom a cage of explicit stipulations must be built?

-- The issue is not a Senate effort to chart new constitutional ground, but an Executive effort to do so. It is not the Senate but the Executive which seeks to assert constitutional principles in a manner which expresses an aggressively broad claim on power. An adequate response requires no counter-assertion of Senate power but a simple manifestation, as reflected in the Biden Condition, of Senate unwillingness to acquiesce in Administration assertions which, if not refuted, could imply acceptance of a radical aggrandizement of presidential power.

The Committee reiterates its intent that the Senate not digress on this question into a replay of the ABM Treaty dispute. That question is not here at issue, and will not be disposed of even by a Senate affirmation of the principles embodied in this Condition. The real issue, simply put, is this: that those who oppose this Condition are, in effect, proposing to concede to the President a power the Framers of the Constitution did not intend to grant him, and which neither any previous President nor any previous Legal Adviser has ever asserted.

The Foreign Relations Committee seeks not to make the Senate the interpreter of treaties, but to require that the Executive interpret and implement treaties within the boundaries of the Executive's original presentation in obtaining Senate consent to ratification. Heretofore, this principle has never been placed at issue, and the Committee urges the Senate to uphold the principle against the current ill-considered and unnecessary challenge.

THE WHITE HOUSE
WASHINGTON

TO: JOHN TUCK

FROM **RHETT B. DAWSON**
Assistant to the President
for Operations

THE SECRETARY OF STATE

WASHINGTON

February 5, 1988

Dear Senator Byrd:

I am writing in response to letters by yourself and Senators Nunn, Pell, and Stevens, and by Senator Wilson and a group of fifteen Senators concerning the question of Senate access to the negotiating record for the INF Treaty. I am gratified that we have now reached an understanding on the way in which the Senate and Administration will proceed in this regard.

I believe that the INF Treaty text is a clear and accurate statement of the obligations of the United States and the Soviet Union. In accordance with international law, we should of course, look first to this text to answer any question about the meaning of these obligations. But I also recognize that the Senate, in discharging its important Constitutional role of considering advice and consent to ratification, may wish to review the negotiating record.

Therefore, we are pleased to provide the Senate access to materials upon which treaty interpretation is based. These include records of the INF negotiations conducted in the Geneva Nuclear and Space Talks, and in ministerial and summit meetings. We will provide access to cables and memoranda of conversation reporting discussions with the Soviets in Geneva, all Joint Draft Texts, U.S. and Soviet prepared texts exchanged at plenaries and other working meetings, and all other documents exchanged between the parties. We cannot provide internal Executive Branch deliberative material that was not provided to the Soviets because such material does not reflect mutual intent of the parties, and therefore, cannot be used as a basis for interpretation of obligations.

The documents we will provide are classified and sensitive. Their disclosure could jeopardize current arms control negotiations with the Soviet Union. Therefore, I am pleased that we have agreed on ground rules for Senate access which will suit our purposes and yours. The attached Terms of Access is a simple, one page agreement on procedures for access, custody, storage appropriate to the classification of the documents, and their eventual return to the State Department. With this understanding we are prepared to deliver the INF negotiating record to the Senate immediately.

The Honorable
Robert Byrd,
United States Senate.

Of course, we remain prepared to respond to any further questions by the Senate as to the content and effect of the INF Treaty negotiating record on particular issues of interest. Our responses will give a full, comprehensive and authoritative account.

I believe that our understanding will make it possible for the Senate to proceed expeditiously with its consideration of the INF Treaty. I understand that the Chairmen and Ranking Members of the Committees on Foreign Relations and Armed Services, the Senate Select Committee on Intelligence and Senator Dole agree with this understanding. I am sure we will be able to resolve any further questions that may arise in a spirit of cooperation and accommodation, and I look forward to working with you on the INF Treaty in the coming weeks.

Sincerely yours,

George P. Shultz

Attachment:

Terms of Access.

cc:

Senator R. Dole

Terms of Access to INF Negotiating Records

The Administration has agreed to make available to the United States Senate records of the negotiations with the Soviet Union on the INF Treaty. Since these documents are the property of the Executive branch and involve classified and sensitive information, they will be made available only at the secure facility at Room 901, Hart Senate Office Building -- the Senate Arms Control Treaty Review Support Office (Support Office). Only Senators, designated staff members, employees of the Support Office and designated members of the Executive branch shall be permitted to enter this secure location. The names of the designated staff members and Support Office employees shall be provided, in writing, to the Department of State prior to their being given access to the documents; and the names of the Executive branch officials shall be provided, in writing, to the Senate. A record of all persons entering and exiting the secure location shall be maintained.

Access to these documents will be limited to Senators and 30 designated staff members. The Chairmen of the Senate Foreign Relations Committee, the Senate Armed Services Committee and the Senate Select Committee on Intelligence will each designate 6 staff members (3 from each party as agreed to by the Ranking Minority Member) and the Majority Leader and the Republican Leader will each designate 6 staff members. Employees of the Support Office shall have access for administrative purposes; their number shall be kept to a reasonable minimum. Such employees and the designated staff members must have all necessary security clearances.

These documents may be reviewed at the secure location only; no copies may be made and retained (working copies may be made for the convenience of the Senators and staff but shall be accounted for and destroyed; they shall not be removed); and no documents may be removed. Any notes derived from classified materials shall be treated as classified and classified documents shall not be referenced in open session.

Within 30 days of the Senate's final vote on advice and consent to ratification of the INF Treaty, or adjournment sine die of the 100th Congress, whichever occurs first, the documents will be returned to the Department of State.

THE WHITE HOUSE
WASHINGTON

Senator Baker

This is the "fix"
that A.B. mentioned
in this morning's meeting.

Bob 4/12

FIX —— ; and consistent with the Constitutional authority of the President

TREATY INTERPRETATION 3/29

1. Henkin Principles (including Constitution)

".....subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (Article II, section 2, clause 2) for the making of treaties:

(a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification;

(b) such common understanding is:

(i) based on the text of the Treaty, as interpreted in accordance with the principles stated in the Vienna Convention on the Law of Treaties; and

(ii) reflected in the authoritative representations provided by the Executive branch to the Senate and its committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;

(c) the United States shall not agree to or adopt an interpretation different from that common understanding ~~without the approval of the Senate~~ "

EXCEPT PURSUANT TO SENATE ADVICE AND CONSENT TO A SUBSEQUENT TREATY OR PROTOCOL, OR THE ENACTMENT OF A STATUTE.

FIX

Before the period at the end of the pending amendment, insert the following:

" provided further, that this understanding shall not be incorporated in the instruments of ratification of this Treaty or otherwise conveyed to the other contracting Party." .

THE WHITE HOUSE

WASHINGTON

March 22, 1988

MEMORANDUM FOR HOWARD H. BAKER, JR.
KENNETH M. DUBERSTEIN
RHETT B. DAWSON
COLIN L. POWELL
ALAN M. KRANOWITZ
THOMAS C. GRISCOM
C. DEAN MCGRATH
NICHOLAS ROSTOW
DAN LEVIN
ROBERT E. LINHARD
ALISON FORTIER
PAMELA J. TURNER

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT

SUBJECT: Follow-up Letter to Senator Lugar

Attached is a copy of the follow-up letter to Senator Lugar as transmitted to him today by our Office of Legislative Affairs.

Attachment

THE WHITE HOUSE

WASHINGTON

March 22, 1988

Dear Senator Lugar:

Discussions concerning my letter to you of March 17, 1988, have raised a question about the Secretary of State's identical letters of February 9, 1988, to Senators Byrd and Nunn. To clear up any misunderstanding that may exist, I should like to assure you that no inconsistency was intended or in fact exists between my letter and Secretary Shultz' letters. Whereas Secretary Shultz responded to the Senators' request for assurances regarding the "authoritativeness" of Executive branch testimony on the INF Treaty and the Senate's ability to rely on such testimony, my letter addressed a specific draft text setting forth what we believe to be unconstitutional and unworkable rules of treaty interpretation.

As the Secretary of State's February 9 letters pointed out: (1) all INF testimony of Executive branch witnesses, within their authorized scope, is authoritative; (2) Administration testimony and materials for the record can be regarded as authoritative without the need for the Senate to incorporate them in its Resolution of Advice and Consent; and (3) the Reagan Administration will in no way depart from the INF Treaty as we are presenting it to the Senate. Those letters remain an accurate statement of our policy and intention with respect to the INF Treaty.

My March 17 letter is consistent with Secretary Shultz' statement of Administration views.

Sincerely,

Arthur B. Culvahouse, Jr.
Counsel to the President

The Honorable Richard D. Lugar
United States Senate
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

March 24, 1988

MEMORANDUM FOR HOWARD H. BAKER, JR.
CHIEF OF STAFF TO THE PRESIDENT

COLIN L. POWELL
ASSISTANT TO THE PRESIDENT FOR
NATIONAL SECURITY AFFAIRS

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT

SUBJECT: INF Treaty -- Proposed Senate Resolution of Ratification (Revised)

The most recent version of the proposed Senate Resolution of Ratification to the INF Treaty (Biden II, copy attached) suffers from the same defects as the earlier version. See letter from Arthur B. Culvahouse, Jr., to Senator Lugar (Mar. 17, 1988), copy attached.

- The proposed Resolution would continue to define the shared understanding of the Senate and the Executive as all statements made to the Senate, no matter how trivial or unimportant to the Senate's ratification. Section 1(b). As such, it would continue to change the rules of treaty interpretation.

- The proposed Resolution would continue to grant the Senate an after the fact role in treaty interpretation and implementation. Section 1(c). This is unconstitutional.

- The proposed Resolution would continue to enhance the risk that the United States will be bound to an interpretation of the Treaty that the Soviet Union is not. This serves the interests of the Soviet Union only.

- The new language in section 1(a) would not rectify these defects.

  -- Incorporating language concerning the legal requirements under domestic law adds nothing. Those requirements would apply even if the language were not included.

-- Incorporating the language from Secretary Shultz's letter simply reiterates the fact that the Senate is relying on all Executive statements. Since we assumed that the previous version imposed this requirement, it does not change our earlier concerns. Furthermore, Secretary Shultz's commitment that Administration witnesses are authoritative (i.e., will tell the truth) is a pledge of good faith. That pledge does not bind the Soviet Union.

-- Incorporating Senator Nunn's language would make it clear that statements made to Senate Committees reflect the shared understanding between the Executive and the Senate. Once again, we had assumed that this was the meaning of the original version. Therefore, it does nothing to resolve our earlier concerns.

o The proposed Resolution fundamentally alters the role of the Senate. Senator Fulbright has previously summarized that role as follows:

> The function of the Senate, if the Senate has any function left under the Constitution, is not to act solely on the basis of what we are told by members of the executive branch. We are supposed to make up our own minds based on our own experience and information.

Cong. Rec. 530645 (Sept. 14, 1972). By this proposed Resolution the Senate would not examine the Treaty, its text or its negotiating record (see proposed Committee Report language) in order to render an independent judgment but would rely solely on Administration testimony.

Attachments

bcc:Rhett B. Dawson

Foreign Relations Committee Provision
on
Treaty Interpretation

RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty ..... subject to the finding contained in Section 1 and the condition contained in Section 2:

Section 1. Finding Concerning Constitutional Principles.
The following principles derive, as a necessary implication, from the provisions of the Constitution, Article II, section 2, clause 2, for the making of treaties [THIS TREATY]:

(a) t[T]he United States shall interpret a [THIS] treaty in accordance with the understanding of the text* of the treaty shared by the Executive and the Senate at the time of Senate consent to ratification. [AS A MATTER OF DOMESTIC LAW, THE PRESIDENT IS BOUND BY SHARED INTERPRETATIONS WHICH WERE BOTH AUTHORITATIVELY COMMUNICATED TO THE SENATE BY THE EXECUTIVE AND CLEARLY INTENDED, GENERALLY UNDERSTOOD, AND RELIED UPON BY THE SENATE IN ITS ADVICE AND CONSENT TO RATIFICATION.(1) THE SECRETARY OF STATE, PURSUANT TO HIS COMMITMENT OF FEBRUARY 9, 1988, SHALL INFORM THE RELEVANT SENATE COMMITTEE OF ANY INSTANCE IN WHICH A WITNESS' TESTIMONY IS NOT AUTHORITATIVE IN ANY RESPECT.(2) THE MEANING OF THE INF TREATY AS PRESENTED TO THE SENATE THROUGH ITS COMMITTEES CAN BE REGARDED BY THE SENATE AS AUTHORITATIVE WITHOUT THE NECESSITY OF THE SENATE'S INCORPORATING THAT TESTIMONY AND MATERIAL IN ITS RESOLUTION OF RATIFICATION THROUGH UNDERSTANDINGS, RESERVATIONS, AMENDMENTS, OR OTHER CONDITIONS.(3)];

(b) s[S]uch common understanding is reflected in authoritative* representations as to the meaning of the treaty provided by the Executive branch in seeking Senate consent to ratification; [.]

(c) t[T]he United States shall not agree to or adopt an interpretation different from that common understanding without the approval* of the Senate.

Section 2. Condition of Senate Advice and Consent.
The Senate's advice and consent to ratification of the INF Treaty is subject to the condition that the United States shall interpret the INF Treaty in accordance with the principles cited in Section 1 of this Resolution.

---

1) from Culvahouse letter, March 17.
2) from Shultz letter, February 9.
3) from Nunn testimony to FRC, March 22.

Additional Report Language

ABM Dispute: "This provision is not designed to resolve the dispute over ~~alleged ambiguities in the genesis, design, and implementation of the ABM Treaty~~, or to constitute a final disposition of [,] the ABM Treaty 'reinterpretation' issue. ~~Rather, the provision is intended to affirm certain constitutional principles which have been brought into question during the 'reinterpretation' debate.~~ [SINCE THE ISSUE OF TREATY INTERPRETATION DID NOT ARISE DURING SENATE CONSIDERATION OF THE ABM TREATY, AND WAS NOT FORESEEN AT THAT TIME, THE ABSENCE OF ANY ACTION PERTAINING TO INTERPRETATION OF THE ABM TREATY AT THAT TIME SHOULD NOT BE UNDERSTOOD AS HAVING ANY BEARING ON THE INTERPRETATION OF THAT TREATY.]"

Negotiating Record: "~~Although Executive memoranda and other~~ negotiating materials may have been available to members of the Senate, some of whom have sought to assure themselves that this 'record' is consistent with the Administration's formal presentation, the clear corollary of the constitutional principles in Section 1 of the Resolution of Ratification is that such documents need not be examined for consistency and shall not be deemed material to the interpretation of the INF Treaty insofar as they are not consistent with the authoritative representations as to the meaning ~~of the Treaty~~ provided by the Executive branch in ~~seeking~~ Senate consent to ratification."

THE WHITE HOUSE

WASHINGTON

March 17, 1988

Dear Senator Lugar:

This letter responds to your letter to Howard Baker of March 9, 1988. The Administration has reviewed the attached March 2 draft of a proposed Senate resolution of advice and consent to the ratification of the INF Treaty.

For the reasons discussed below, the Administration believes that sections 1 and 2 of the Resolution (hereinafter these sections are referred to as the "Resolution") are seriously flawed. The Resolution would change the legal rules of treaty interpretation. It would impose an unconstitutional mechanism for the alteration of a treaty interpretation. Moreover, it would greatly increase the risk of inflexible distinctions between the meaning of a treaty for purposes of international law and its meaning for purposes of domestic law -- distinctions that could operate to the disadvantage of the United States.

Therefore, we believe the Resolution is not in the best interests of the United States.

Changing the Rules of Treaty Interpretation

We agree that the Executive is, as a matter of domestic law, required to adhere to the interpretation of a treaty authoritatively shared with, and clearly intended, generally understood and relied upon by, the Senate at the time of its advice and consent to ratification. The Resolution, however, would purport to expand the Executive's obligation beyond this settled principle. Sections 1(b) and 2 of the Resolution apparently would define that shared understanding as encompassing all statements made by officials of the Executive branch during ratification proceedings. These statements presumably include and attribute equal dignity to the Secretary of State's definitive article-by-article analysis and to the extensive testimony of Cabinet Members, treaty negotiators and other Executive branch officials, as well as to the Administration's answers to over 1,000 questions submitted by Members of the Senate, no matter how trivial or how unimportant the issue addressed may be to the Senate's advice and consent deliberations.

This overly broad standard is inconsistent with the principles governing judicial interpretation of treaties as a matter of domestic law. Such a general statement would not in our view provide the guidance required for the President or a court to give meaning to the INF Treaty.

Section 1 of the Resolution focuses solely on the role that Executive representations play in the interpretation of treaties, but fails to acknowledge the most important interpretative tool -- the text of the treaty itself. Ignoring the text of the treaty is inconsistent with bedrock rules of treaty interpretation, which mandate that the text is the best evidence of the parties' intent. Although "authoritative representations" are among the tools for interpreting ambiguous provisions in a treaty under domestic law, the language of the treaty is the primary means by which a treaty is interpreted.

Unconstitutional Mechanism for Altering Treaty Interpretation

Section 1(c) of the Resolution would purport to grant the Senate a role in interpreting treaties not contemplated by the Constitution. Section 1(c) states that the "United States shall not agree to or adopt [a different] interpretation" of a treaty "without the approval of the Senate." This provision of the Resolution and the Section 1(b) incorporation by reference of all Executive statements as critical shared understandings purport to provide the Senate with an ongoing power to accept or reject subsequent Executive interpretations and implementations of the INF Treaty. A "reinterpretation," subject to Senate approval, seemingly would occur each time implementation of the treaty calls into question any Executive statement in the massive ratification record. This section, therefore, interferes with the President's constitutional responsibility to interpret and implement treaties and also constitutes an unprecedented arrogation of treaty power by the Senate.

The Constitution does not provide that treaties may be amended by the Senate and the Executive acting alone after ratification, nor does it permit unicameral "interpretive" legislation. The provisions in Sections 1(c) and 2 that contemplate such a process are not consistent with the Constitution.

Risk of Unilateral Restrictions on the United States

As noted above, when interpreting a treaty, one obviously looks first and foremost to the text of the treaty itself. In instances where the treaty text is not dispositive or is unclear, under international law one looks primarily to the negotiating record and the subsequent practice of the treaty parties. As a matter of domestic law, however, the President

is bound by shared interpretations which were both authoritatively communicated to the Senate by the Executive and clearly intended, generally understood and relied upon by the Senate in its advice and consent to ratification. This is true even if the treaty negotiating record and subsequent practice indicate an interpretation contrary to that shared understanding. Exchanges in Senate proceedings in connection with the ratification of a treaty cannot under international law alter the meaning of a treaty where they are not officially communicated to the other treaty party prior to the exchange of instruments of ratification. The result might be two INF treaties, one binding domestically against the President and a second one binding internationally between the United States and the Soviet Union. In our view, the Resolution would substantially increase this risk of a dichotomy between the interpretation of a treaty under international law and the interpretation to which the President constitutionally is bound under domestic law. While we have spared no effort to ensure that Administration statements reflect the correct interpretation of the INF Treaty, the magnitude of the record heightens the risk of divergence between our domestic and international legal obligations. Any such difference will favor the Soviet Union because the Soviet Union is not and cannot be bound by our domestic processes.

The principles of treaty interpretation stated herein in no way contradict the position previously taken by the Administration with respect to the ABM Treaty. The President is obligated to abide by a treaty interpretation clearly intended, generally understood and relied upon by the Senate, based on authoritative Executive Branch representations during its advice and consent to ratification. Our position in the ABM case is not that the President may disregard such clearly intended interpretations, but rather that the ABM Treaty ratification record does not establish as a matter of law that the Senate clearly intended that the restrictive interpretation be followed. Administration witnesses had presented inconsistent and ambiguous views on the reach of these provisions, and the Senate as a whole did not assert a view. The President, therefore, is legally entitled to interpret the ABM Treaty on the basis of materials other than the ratification record, including the negotiating history. As you know, we believe that the negotiating record shows that the Soviet Union did not agree to be bound to the restrictive interpretation.

This letter is presented in a spirit of cooperation and in the hope that the Senate and the Executive can agree that the INF Treaty should receive the advice and consent of the Senate without any conditions. We do not believe that it is necessary or desirable to address broad, free-standing

constitutional principles in a resolution of advice and consent. We believe that the proposed Resolution only serves the interests of confusion, ambiguity, confrontation and uncertainty. This Administration, of course, intends to consult closely with the Senate as the INF Treaty, upon ratification, is implemented and interpreted, and we will continue to embark upon such consultation in candor and good faith.

This letter also reflects the views of the legal offices of the Department of State, Department of Defense, the Office of Legal Counsel, Department of Justice, the Arms Control and Disarmament Agency, and National Security Council.

Sincerely,

Arthur B. Culvahouse, Jr.
Counsel to the President

The Honorable Richard D. Lugar
United States Senate
Washington, D.C. 20510

Attachment

RICHARD G. LUGAR
INDIANA

SH 306 SENATE OFFICE BUILDING
WASHINGTON, DC 20510
202-224-4814

COMMITTEES:
FOREIGN RELATIONS
AGRICULTURE, NUTRITION AND FORESTRY

United States Senate

WASHINGTON, DC 20510

March 9, 1988

The Honorable Howard Baker
Chief of Staff to the
President of the United States
The White House
Washington, DC 20500

Dear Howard:

Attached is the latest version of a draft by Democratic Members of the Foreign Relations Committee seeking to address the "interpretation issue" in the form of an amendment to the INF Treaty. Senators Biden, Cranston and Pell are seeking Republican support for this approach.

Although my own preference for the moment would be for a "clean" INF Treaty, I have indicated that I would not be prepared to discuss the Democratic draft formally until I had received some indication from the White House as to its thinking on the "interpretation" issue as a whole as well as any vehicle that might be employed to express the Senate's interest in the matter.

I would appreciate it if you could share with me the White House's thoughts on this matter as well as any guidance you may wish to offer relative to discussions and negotiations with the Democratic Members of the Committee and the Senate Democratic leadership.

Sincerely,

Richard G. Lugar
United States Senator

RGL/bn

RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), **That** the Senate advise and consent to ratification of the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles and the two Protocols thereto, together referred to as the INF Treaty, all signed at Washington, on December 8, 1987 (Treaty Doc. 100-11), subject to the finding contained in Section 1 and the condition contained in Section 2:

Section 1. Finding Concerning Constitutional Principles.

The following principles derive, as a necessary implication, from the provisions of the Constitution, Article II, section 2, clause 2, for the making of treaties:

(a) the United States shall interpret a treaty in accordance with the understanding of the meaning of the treaty shared by the Executive and the Senate at the time of Senate consent to ratification;

(b) such common understanding is reflected in authoritative representations as to the meaning of the treaty provided by the Executive branch in seeking Senate consent to ratification;

(c) the United States shall not agree to or adopt an interpretation different from that common understanding without the approval of the Senate.

Section 2. Condition of Senate Advice and Consent.

The Senate's advice and consent to ratification of the INF Treaty is subject to the condition that the United States shall interpret the INF Treaty in accordance with the principles cited in Section 1 of this Resolution.

Report Language: "This provision is not designed to resolve the dispute over alleged ambiguities in the genesis, design, and implementation of the ABM Treaty, or to constitute a final disposition of the ABM Treaty 'reinterpretation' issue. Rather, the provision is intended to affirm certain constitutional principles which have been brought into question during the 'reinterpretation' debate."

UNCLASSIFIED WITH
SECRET ATTACHMENT

~~SECRET~~

THE WHITE HOUSE

WASHINGTON

SYSTEM II
90208

March 24, 1988

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: COLIN L. POWELL

SUBJECT: Meeting with Senator Tower

Attached at Tab A are talking points on START, the Moscow Summit, and the implications for START of the INF ratification proceedings for use in your meeting with Senator Tower.

Attachment

Tab A Talking Points

UNCLASSIFIED WITH
SECRET ATTACHMENT

~~SECRET~~ 8/24/04 KDB

A

94995

SECRET

SYSTEM II
90208

POINTS TO BE MADE

MEETING WITH FORMER SENATOR JOHN TOWER

START and INF

1. Stampede To a Treaty

-- We want a good treaty, not a quick treaty. If a treaty is ready by the Moscow Summit, the President will be prepared to sign it. If it is not ready, he will not sign. He will not permit us to be stampeded by artificial deadlines into accepting positions not in the national interest.

-- At the same time, the President has directed us to make every effort to complete the treaty in time for the Summit. If there is no treaty, it will not be because we failed to do our homework.

-- The President's Washington Post interview was designed to dampen excessive expectations.

-- The President said he would consider a second summit in the Fall to sign a START Treaty, but we won't be blackmailed by a second Summit deadline either.

2. INF and START: Substantive Precedents

-- START is different from INF; it has different problems requiring different solutions.

-- We recognize congressional concerns with respect to verification and limiting U.S. conventional capability.

-- For example, we will not accept a ban on conventional air- or sea-launched cruise missiles. In the INF treaty, we agreed to a ban on conventional GLCMs because we had identified no military need for such weapons and because allowing them would legitimize an entire infrastructure.

-- The START verification regime will build on INF but must be adapted to the different situation: INF covers only land-based missile systems and is a regime of complete elimination. START covers many more types of systems and will allow systems to remain in existence; it thus requires a monitoring regime even more stringent than the INF regime.

3. START and Deterrence

-- Strategic modernization will be protected and will continue.

-- The President will not accept crippling restrictions on SDI; the Soviets seem to recognize this fact.

-- Some in Congress fear we will give up important rights to mobile ICBMs. While we have sought to ban them in order to facilitate verification, in the end, we likely will agree to such missiles with suitable limits.

4. INF Ratification and START Ratification

-- In a departure from past practice, the Senate was given access to the entire INF negotiating record. We understand that Secretary Shultz does not wish to provide similar access to the START negotiating record. The Senate undoubtedly will expect such access.

-- We received and answered an unprecedented number of written questions in connection with the INF Treaty. We likely will receive even more questions regarding START.

-- As a result of the ABM Treaty interpretation dispute, Senators are attempting to bind the Administration to a regime for treaty interpretation applying to all treaties that would require Senate approval for any changes in treaty interpretation from representations made during ratification hearings. As you know, we regard the proposals thus far seen as unconstitutional and unworkable.

-- If we prevail with respect to INF, we can expect renewed effort along the same lines with respect to START.

5. INF Substantive Issues

-- Senators mainly have focussed on the following issues in connection with the INF Treaty:

  o Whether the intelligence community agrees with the data provided by the Soviets;

  o Monitoring procedures, rules about concealment and interference with NTM, and the degree of confidence in monitoring and verification; and

  o Effects on patterns of cooperation and dealings with our Allies.